United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-2139

Original

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES ex rel.
ORLANDO RODRIGUEZ,

Petitioner-Appellee,

-against-

HAROLD BUTLER, Superintendent,
Wallkill Correctional Facility,
Wallkill, New York,

Respondent-Appellant.

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B
P/s

BRIEF FOR RESPONDENT-APPELLANT

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent-
Appellant
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-6044

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

LILLIAN Z. COHEN
Assistant Attorney General
of Counsel

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UNITED STATES COURT OF APPEALS
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UNITED STATES ex rel. ORLANDO RODRIGUEZ,

Petitioner-Appellee,

-against-

HAROLD BUTLER, Superintendent, Wallkill Correctional Facility, Wallkill, New York,

Respondent-Appellant.

----------X

Docket No. 75-8298

BRIEF FOR RESPONDENT-APPELLANT

Questions Presented

1. Did the District Court correctly decide that appellee had satisfied the exhaustion requirement of 28 U.S.C. § 2254 with respect to his claim that his Fourth Amendment rights were violated by the failure of the police to announce themselves before entering his apartment where no such claim was raised before or at trial and on appeal the statement that this was error relied merely upon state law?

2. Did the District Court correctly hold that the unannounced entry by the police into appellee's apartment was unconstitutional notwithstanding the fact that there was probable cause to believe that appellee had brought in narcotics where his arrest took place in the midst of a large-scale police operation requiring the police to act without alerting him?

Statement

This is an appeal from an order of the United States District Court for the Southern District of New York (Motley, J.) dated September 23, 1975, which granted appellee's application for a writ of habeas corpus without holding a hearing and directed the State to retry appellee within 60 days or release him. The Court granted a stay of its order upon the filing of appellant's notice of appeal.

Facts

Appellee, Orlando Rodriquez, is presently confined in Wallkill Correctional Facility, Wallkill, New York, pursuant to a judgment of conviction rendered in County Court, Westchester County (Beisheim Jr., J.). He was convicted after a jury trial of the crime of felonious possession of a dangerous drug in the first degree and was sentenced on July 20, 1970 to an indeterminate term of imprisonment not to exceed five years.*

Appellee was one of a group of persons arrested in the City of Yonkers during the evening of January 13, 1969 and the early morning hours of January 14, 1969 following an investigation into a large scale narcotics conspiracy centered in that city.

* Appellee notes in his petition that there is a discrepancy between the five year term imposed by the Court and the commitment papers which specify a fifteen year term. However, he does not challenge the legality of his sentence. Section 70.00(2)(c) of the New York Penal Law permits the imposition of a sentence not to exceed fifteen years upon conviction of a Class C felony such as is involved in appellee's case.

Shortly before midnight on January 13, Lawrence Martin, an Assistant Westchester County District Attorney, together with investigators from the Sheriff's office and police officers from the Yonkers and New York City Police Departments proceeded to the area of 250 North Broadway, Yonkers to execute search warrants for designated apartments, cars and persons (not including appellee). Based upon the prior knowledge of the officers and the events of that evening appellee was arrested and a quantity of cocaine was seized in his apartment. It is the legality of the means of effecting appellee's arrest which is in issue on this appeal.

PRE-TRIAL PROCEEDINGS

On December 29, 1969, appellee's attorney made a motion to suppress the evidence seized from appellee's apartment

> "on the grounds that said evidence was seized without a valid search warrant, warrant of arrest without consent and without probable cause, prior to the arrest of the above named defendant and after an exploratory search" (A. 30).*

Appellee's affidavit in support of the motion alleged that "police officers entered [his] apartment" and searched him, his wife and the apartment without a search warrant, an arrest warrant or the consent of the occupants (A. 31).

* Numbers in parentheses preceded by the letter "A" refer to pages of the Appendix in this appeal.

On January 13, 1970, the District Attorney of Westchester County consented to a hearing "limited to the issue of whether or not the officers had probable cause to make the arrest in question" pointing out that "there has been no other issue raised" (A. 33).

On January 26, 1970, County Court Judge Burchell ordered that a hearing be held "to determine the legality of the arrests of defendants" and also to examine the scope of the ensuing search in light of Chimel v. California, 395 U.S. 752 (1969)(A. 35).

The District Attorney's office thereafter made a motion to reargue the Court's order of January 26, 1970 on the ground that the moving papers raise no issue as to the scope of the search. Alternatively, the District Attorney argued that Chimel was inapplicable to appellee's case since that decision post-dated the search and is being given only prospective application (A. 37-38).

In a decision and order dated March 9, 1970 the Court acknowledged the inapplicability of Chimel and, therefore, limited the hearing to be held "to the question of whether or not there was probable cause for an arrest of defendants" (A. 40).

The suppression hearing was held on April 14, 1970 and the single witness called was Lawrence Martin, the Assistant District Attorney in charge of the operation leading to appellee's arrest. He testified that on January 13, 1969, the police learned by means of wiretaps that one Danial Gonzales was going that evening with two other men to pick up a quantity of narcotics (S.H. 15, 38-39).* He and a number of police officers went to 250 North Broadway in Yonkers armed with a search warrant for Gonzales' apartment. Before conducting their search, one of the officers questioned the superintendent of the building about Gonzales and learned that he was friendly with a man named Rodriquez who lived on the second floor of the building and that the two men often used the fire escape to go back and forth between each other's apartments (S.H. 13). When Martin was admitted to Gonzales' apartment he discovered that Gonzales had not yet returned. Shortly afterwards, however, he was advised via walkie-talkie that three men had entered the building and were on their way upstairs (S.H. 15). A few moments later, Gonzales and an unknown man entered the Gonzales apartment and were arrested. They had no narcotics in their possession (S.H. 16, 39, 41). Martin then received a report that the third man had been followed to an apartment on the second floor rented in the name of Rodriquez (S.H. 17). The man was carrying a package when he entered the building (S.H. 31, 33).

* Numbers in parentheses preceded by letters "S.H." refer to pages of the minutes of the suppression hearing.

After receiving this report Martin went to a building directly across the street where other persons connected with the narcotics ring had been arrested that same evening. He spoke with Investigator Garcia who had been involved in listening to and interpreting the wiretaps on the Gonzales telephone and told him about the superintendent's report as well as the fact that the third man had entered the Rodriquez apartment (S.H. 17, 19). Garcia reminded him that wiretaps had disclosed that Gonzales and a man named Rodriquez were couriers for the group under investigation. Moreover, Gonzales and Rodriquez had been arrested in New Jersey several days earlier for transporting narcotics. The conversations between the wives of the two men revealed that they were working for the two men heading the narcotics ring (S.H. 20).

Based on all of this information and also based on the fact that a paddy wagon was "about to arrive" to pick up all of the people who had been arrested that evening, Martin directed several officers to go to the Rodriquez apartment and arrest him for conspiracy to possess narcotics (S.H. 21, 36).* According

* Approximately 14 persons were arrested and 4 premises searched during the evening of January 13, 1969 (S.H. 25, 36). Apparently all of the arrests took place at 250 North Broadway or in the immediate vicinity of that building.

to Martin, the operation had been very quiet up to this point and he feared that if Rodriquez were alerted by the activity caused by the other arrests he might escape (S.H. 36).

On April 15, 1970 the trial Court denied the motion to suppress holding that there was probable cause to arrest Rodriquez.

THE TRIAL

At trial three officers testified as to the circumstances of appellee's arrest and the search of his apartment. Two of them, Officers Arone and Rubinfeld had been stationed in the lobby of 250 North Broadway at approximately 2:00 a.m. on January 14, 1969 to maintain surveillance (T. 12, 59).* Shortly, thereafter they saw three men enter the lobby, one of whom was recognized as Daniel Gonzales (T. 13). They observed that one of the other men, later identified as appellee Orlando Rodriquez, was carrying a package under his arm (T. 14). Officer Arone entered the elevator with the men and got off on the second floor when the man carrying the package exited (T. 16, 38). After noting the apartment which the man entered he returned to the lobby and reported to Assistant District Attorney Martin (T. 16-17). He was directed to go to the second floor apartment and arrest the man on conspiracy charges (T. 17).

* Numbers in parentheses preceded by the letter "T" refer to pages of the trial transcript.

The arresting officers gained entry to appellee's apartment by means of a passkey obtained from the superintendent (T. 142). Appellee who was in the livingroom, was immediately placed under arrest as directed (T. 18, 42, 78). At the same time, a woman, later determined to be appellee's wife, was seen to exit from the bathroom down the hall (T. 18). A search of the bathroom disclosed a large glassine type bag containing a white powder (T. 19). The bag was similar in size to the one which appellee was carrying when he entered the apartment shortly before (T. 50). In addition, the officers found a Hanson scale on the kitchen counter (T. 24) and a rolled-up dollar bill with traces of white powder on it which had been shoved under a cushion (T. 62).

The other prosecution witnesses included Assistant District Attorney Martin, who testified as to certain admissions made by appellee with respect to the narcotics which had been seized and another police officer, who testified as to the value of the seized narcotics and the fact that the apartment where appellee was arrested was leased to him and his wife.

Although the three arresting officers who testified at the trial acknowleged that they had entered appellee's apartment without knocking, at no point did the defense object to the introduction of the seized evidence on this ground.

Defense counsel simply revived the motion to dismiss the indictment based upon "all of the grounds that I have already advanced", including "the suppression hearing,... the Huntley hearing and the eavesdropping order" (T. 179).

THE APPEAL FROM THE JUDGMENT OF CONVICTION

On appeal, appellee was represented by a different attorney who argued, inter alia, that there was no probable cause to arrest appellee and conduct the search and that the search was also "bad" because, contrary to the requirements of Section 799 of the former New York Code of Criminal Procedure "the police had no right to enter the premises without announcing their authority" (Appellee's Brief in the Appellate Division, p. 23).*

The judgment of conviction was unanimously affirmed without opinion by the Appellate Division. People v. Rodriquez, 40 A D 2d 763 (2d Dept. 1972). Leave to appeal to the New York Court of Appeals was denied on November 2, 1972 (Breitel, C.J.).

* Other claims raised related to the admissibility of certain statements, the sufficiency of the charge to the jury, an alleged denial of the right of confrontation, and an inconsistency in the testimony of one of one of the witnesses. These were all rejected by the District Court and are not before the Court on this appeal since appellee did not file a cross-notice of appeal. A copy of appellee's brief in the Appellate Division was submitted to the District Court, as was the brief of the District Attorney. Both briefs will be submitted to this Court by appellant.

PROCEEDINGS IN THE DISTRICT COURT

Except for a few omissions and minor changes, appellee's application to the District Court is substantially the same as his Appellate Division brief. The District Court found that appellee had satisfied the exhaustion requirement of 28 U.S.C. § 2254(b) with respect to each of the claims raised. The Court rejected appellant's contention that the issue of the unannounced police entry had not been sufficiently raised on the ground that the briefs before the Appellate Division had given the state courts "adequate opportunity" to review the claim.

With respect to the validity of the search and seizure the Court found, preliminarily, that there was probable cause to arrest appellee. The Court pointed out that (1) the police knew that Gonzales and two other men had an appointment to pick up narcotics on the evening of January 13, 1969; (2) Gonzales returned to the building with two men, one of whom was carrying a package; (3) when Gonzales and one of the men entered the Gonzales' apartment neither was carrying narcotics; (4) the third man, who had been carrying the package, entered a second floor apartment leased to one Rodriguez; (5) Gonzales was known to be friendly with a man named Rodriguez who lived on the second floor; (6) Gonzales and a man named Rodriguez had been arrested in New Jersey on narcotics charges several day earlier.

The Court also held that although there was no search warrant this would not invalidate a search which occurred prior to Chimel v. California, 395 U.S. 752 (1969) so long as it was incident to a lawful arrest.

The Court then went on to hold that the search was in in violation of the Fourth Amendment solely because of the unannounced entry by the police into appellee's apartment. Although the Court acknowledged that the announcement requirement is not absolute, it found that "on the facts of this case, there were [no] sufficiently compelling circumstances present to justify" what the police did. In particular, the Court rejected the argument that the imminent arrival of paddy wagons was an exigent circumstance, stating, "an announcement would have taken only a few moments, and the paddy wagons could have been delayed briefly by radio communication." In the Court's view, "the mere fact that narcotics or other destructible evidence are involved" does not justify an exception to the announcement rule (Emphasis in original).

POINT I

APPELLEE HAS FAILED TO SATISFY THE EXHAUSTION REQUIREMENT OF 28 U.S.C. § 2254(b) WITH RESPECT TO HIS CLAIM THAT HIS CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN THE POLICE ENTERED HIS APARTMENT WITHOUT A PRIOR ANNOUNCEMENT.

It is fundamental that, as an applicant for federal habeas corpus relief, appellee has the burden of demonstrating that he has exhausted his available state remedies. In order to satisfy this burden he must show either (1) that he "fairly presented to the state courts the same constitutional claim relied upon in his federal application (See Picard v. Connor, 404 U.S. 270, 275 [1971]; United States ex rel. Gibbs v. Zelker, 496 F. 2d 991 [2d Cir. 1974]) or (2) that there was no available remedy to review this claim. 28 U.S.C. § 2254(b). He has shown neither.

Although § 178 of the former New York Code of Criminal Procedure specifically required announcement prior to entry, it is clear from the record that no objection was raised by defense counsel before or during trial on this statutory ground, let alone on the ground that such entry resulted in a Fourth Amendment violation. Thus, despite the fact that the circumstances of the entry by the police were within the defendant's

own knowledge, the pre-trial motion to dismiss is limited to the claim that there was no probable cause to arrest and search. If there were any doubt as to the scope of the inquiry on that motion, it is resolved by the fact that the defense did not object when the final order of the trial Court confined the hearing "to the question of whether or not there was probable cause to arrest the defendants [Orlando Rodriquez and his wife]." Nor did the defense seek to enlarge the scope of the inquiry at the time of the hearing.

The only witness at the hearing was the Assistant District Attorney who was in charge of investigating the narcotics ring of which appellee was a member. His testimony is confined to the circumstances which culminated in his ordering appellee's arrest. He could not testify as to the circumstances of that arrest since he was not present. The decision of the trial court denying the motion to suppress is similarly limited to the probable cause question.

Assuming arguendo that defense counsel was unaware of the unannounced entry prior to trial -- an unlikely assumption in light of appellee's present expressions of indignation -- it is clear from the record that any gaps in his knowledge were filled by the time the trial began since it was he who elicited the circumstances of the entry during cross-examination.

Nevertheless, no objection was raised during trial on this ground.

It was not until the appeal from the judgment of conviction -- when appellee was represented by another attorney -- that there is any objection to the means by which the police entered appellee's apartment. The objection is confined to a sentence sandwiched between a general argument that there was no probable cause to search and an argument that there was no constructive possession of the narcotics. That sentence reads:

> "In the first place, the police had no right to enter the premises without announcing their authority (Section 799, Code Crim. Pro.)."* (App. Brief in the Appellate Division, p. 23).

As part of its argument that there was probable cause to arrest appellee and search his apartment, the brief of the District Attorney states that entry without notice was proper in the instant case because there was probable cause to believe that appellee had carried in a package of narcotics, an item which is easily destroyed, and is also an instrumentality of the crime charged. (Brief of District Attorney p. 7).

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* The factual setting for this statement appears at page 16 of the Brief where appellee explains that a passkey was used to effect entry. In addition there is an allegation in the point heading of the argument that the police officers "burst" into appellee's apartment without announcement, an allegation which is not borne out by the trial testimony.

Based upon these two cryptic statements, the District Court concluded that "this very issue", i.e. "the alleged constitutional defect" arising from the announced entry had been adequately presented to the state courts (A. 51). In fact, however, it is evident "this very [constitutional] issue" was presented to the state courts and the decision of the District Court must be reversed on this ground.

The only legal authority cited in appellee's state court brief to support his belated suggestion that the announced entry was improper is Section 799 of the former New York Code of Criminal Procedure. There is no reference to the Constitution or to the Supreme Court decision in Ker v. California, 374 U.S. 23 (1963), which was then and still is the leading decision on the constutionality of so-called "no-knock" entry by the police. At best, therefore, appellee raised an issue as to whether there had been a failure to comply with state law and, given the fact that no objection had been interposed on this ground in the trial court, it is questionable whether the state courts even addressed themselves to the issue.**

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* The need to refer to the District Attorney's Brief suggests that the District Court believed that appellee's brief, standing alone, did not sufficiently present the issue.

** It is significant in this regard that the only authority cited by appellee in his Appellate Division brief in support of his statement is not specifically applicable. Section 799 of the former Code of Criminal Procedure dealt with no-knock entries pursuant to search warrant. Since there was no warrant in the instant case the relevant section was former Section 178.

Application of the exhaustion requirement is particularly appropriate in the instant case since there is an underlying issue of state law which, if decided in appellee's favor, eliminates the need to reach the constitutional issue at all. See United States ex rel. Johnson v. Vincent, 507 F. 2d 1309, 1312 (2d Cir. 1974). Under the New York law, not every unannounced entry is illegal. On the contrary, the validity of such entries is determined on the facts of each particular case. Compare People v. Floyd, 26 N Y 2d 558 (1970) and People v. Mills, 31 A D 2d 433 (4th Dept. 1969) with People v. McIlwain, 28 A D 2d 711 (2d Dept. 1967) and People v. DeLago, 16 N Y 2d 289 (1965). See also pp. 23-23, ante. The New York Courts should determine in the first instance whether or not there was a violation of state law. See Ker v. California, 374 U.S. 23, 41 (1969). If there was none, then the state courts should examine the constitutional question. Requiring anything less would represent a retreat from this Court prior decisions. See United States ex rel. Nelson v. Zelker, 465 F. 2d 1121, 1124-1125 (2d Cir. 1972); United States ex rel. Carter v. LaVallee, 441 F. 2d 620, 622 (2d Cir. 1971); United States ex rel. Gibbs v. Zelker, 496 F. 2d 991, 994 (2d Cir. 1972).

POINT II

THE DISTRICT COURT ERRONEOUSLY HELD THAT THE UNANNOUNCED ENTRY BY THE POLICE INTO APPELLEE'S APARTMENT VIOLATED HIS FOURTH AMENDMENT RIGHT.

Based upon the record of appellee's state court conviction the District Court specifically held that there was probable cause to arrest him and implicitly held that, under the circumstances, it was unnecessary to obtain an arrest and/or search warrant. Nevertheless, the Court invalidated the ensuing search because of the unannounced entry into appellee's apartment. In the Court's view, failure to comply with the announcement rule should be excused only in "exceptional situations" because the rule is

> "as essential to protection of the individual against unreasonable searches and seizures as the requirement that searches be made pursuant to warrants, a requirement which is dispensed with only in exceptional situations."

The Court thus concluded that in the instant case the circumstances were exceptional enough to dispense with the warrant requirement but not with the announcement requirement. It reached this incongruous result only by refusing to consider the entry in the context of the events preceding it. Both its reasoning and its conclusion were erroneous and should be reversed.

Ker v. California, 374 U.S. 23 (1963) is the leading decision on the question of unannounced entries. In that case police officers observed a man participate in what looked like a purchase of marijuana made in similar circumstances by another officer the night before. They followed the man when he drove away but lost his trail after he made a U-turn. A check with the Department of Motor Vehicles revealed that the car was registered in the name of George D. Ker, a man who had reportedly engaged in narcotics transactions on other occasions. Based on this information, the police proceeded to Ker's apartment and let themselves in by means of a passkey. They found Ker sitting in the livingroom and, as they identified themselves, they saw Mrs. Ker emerge from the kitchen. Without entering the kitchen one of the officers saw a brick-like package which he recognized as marijuana on the kitchen counter. The Kers were then arrested on charges of possession.

In finding that the entry into Ker's apartment was reasonable by Fourth Amendment standards, four members of the Court relied upon the fact that narcotics are often disposed of when the police attempt to make an arrest, and the fact that Ker apparently had tried to elude the police earlier that evening. 374 U.S. at 40.*

* Mr. Justice Harlan, in a separate opinion disputed the applicability of the reasonableness standard but concurred in the result reached on the grounds of fundamental fairness.

The District Court, in its opinion, briefly discussed the reasoning in Ker and then proceeded to distinguish it on the grounds that (a) there were no "exigent circumstances" in the instant case and (b) the mere fact that easily disposable narcotics were involved is not a basis for excusing announcement. In fact, however, the opinion of Mr. Justice Clark in Ker makes no determination as to whether so-called exigent circumstances were present there. On the contrary, the opinion simply inquires into the reasonableness of the entry.

The Decision in Ker is dispositive of the instant case. If it was reasonable to permit a no-knock entry in Ker which involved an isolated arrest based on possible destruction of evidence and ambiguously furtive conduct, then, a fortiori, it is reasonable to permit it in the context of a large-scale police action affecting at least 14 persons, living in neighboring buildings where, in the midst of that action the police fortuitiously acquired a basis for arresting another person involved in the narcotics ring and the same type of easily destroyed evidence was involved.

Contrary to the reasoning of the District Court, in the instant case the same considerations which excused the need to obtain a warrant were sufficient to justify a quick, quiet unannounced entry in view of the disposable nature of the evidence.

Assistant District Attorney Martin testified at the suppression hearing that at the point when he directed appellee's arrest "the police were about to arrive with a paddy wagon to take away the [fourteen] other prisoners who had been arrested (S.H. 36).

> "Up to this very moment when they hit his apartment, Rodriquez' apartment, everything had been kept very quiet. It was early in the morning. Nobody appeared. There were no crowds around. Nothing at that point. And I knew as soon as the police arrived and police cars arrived, that he would be alerted to us and that he might escape" (S.H. 36).

In short, in the judgment of the person who was present during the events in question, it was necessary to act quickly and quietly without alerting appellee.

The District Court rejected this consideration stating, "an announcement would have only taken a few moments, and the paddy wagons could have been delayed briefly by radio communication" (A. 63). Whatever validity this facile view might have in another case, it is plainly unrealistic in the instant case and, reflects the Court's limited, hindsight view of the events occurring before as well as at the time of appellee's arrest.

The question is not whether the police could have abruptly interrupted their activities at the time -- itself, a dubious assumption -- but whether what they in fact did was reasonable considering all the circumstances. We submit that it was.

Assuming arguendo, however, that the District Court was correct in divorcing the entry into appellee's apartment from the context of the entire police operation, the police could still make an unannounced entry based upon the fact that they had excellent probable cause to believe that appellee had just brought narcotics into his apartment which could readily be disposed of.* The District Court rejected this view, relying primarily upon two federal statutes dealing with the question of announcement, i.e., 8 U.S.C. § 3109, which sets forth the federal announcement requirement and is analogous to § 178 of the former New York Code of Criminal Procedure, and 21 U.S.C. § 879(b), which authorizes "no-knock" entries in drug cases under certain conditions. However, neither statute purports to state the constitutional minimum with respect to the announcement

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* The potential for easy destruction of narcotics is dramatically illustrated by the facts of this case. The record shows that at the moment the police entered the apartment -- presumably the same moment at which they might have knocked -- the narcotics were located in the bathroom. Moreover, appellee's wife was also in the bathroom and, therefore, in a position to dispose of the evidence quickly (T. 18, 19).

requirement.* Indeed, the legislative history of the Drug Control Act specifically concludes that "'no-knock' legislation even broader than subsection (b) is constitutional" under Ker v. California, 1970 U.S. Code Cong. and Adm. News, p. 4591.

In any event, assuming, as the District Court did, that these statutes reflect the judgment of Congress that a no-knock entry may not be based solely on the nature of the evidence, this judgment is not binding on the states. In Ker, the Supreme Court held:

> "...the 'principles governing the admissibility of evidence in federal criminal trials have not been restricted . . . to those derived solely from the Constitution. In the exercise of its supervisory authority over the administration of criminal justice in the federal courts... this Court has . . . formulated rules of evidence to be applied in federal criminal prosecutions.' McNabb v. United States, 357 U.S. 301 (1958); cf. Miller v. United States, 357 U.S. 301 (1958); Nardone v. United States, 302 U.S. 379 (1937). Mapp, however, established no assumption by this Court of supervisory authority over state courts, cf. Cleary v. Bolger, 371 U.S. 392, 401 (1963), and, consequently, it implied no total obliteration of state laws relating to arrests and searches in favor of federal law." 374 U.S. at 31.

* Miller v. United States, 357 U.S. 301 (1958), in which the Supreme Court invalidated an arrest and search conducted in violation of § 3109, was specifically distinguished in Ker v. California on the ground that it was decided in the exercise of the Court's supervisory power and not on a constitutional basis.

Therefore the states are free to develop

> "...workable rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the States, provides that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain."

Consistently with this view, the New York Legislature has enacted a "no-knock" statute which, at the time of appellee's conviction, provided, inter alia:

> "The officer may break open an outer or inner door or window of a building, or any part of the building, or any thing therein, to execute the warrant, . . . (b) without notice of his authority and purpose, if the judge, justice or magistrate issuing the warrant has inserted a direction therein that the officer executing it shall not be required to give such notice. The judge, justice or magistrate may so direct only upon proof under oath, to his satisfaction, that the property sought may be easily and quickly destroyed or disposed of, or that danger to the life or limb of the officer or another may result, if such notice were to be given." Former New York Code of Criminal Procedure, § 799. (Emphasis supplied).*

* The present version of the no-knock statute is set forth in § 690.35(3)(b) of the Criminal Procedure Law. In addition, § 120.80 of the Criminal Procedure Law permits unannounced entries under certain circumstances where the officer has no warrant.

The constitutionality of the provision was upheld by the New York Court of Appeals in People v. DeLago, 16 N Y 2d 289 (1965).

Despite the fact that the District Court was reviewing a New York judgment of conviction, its decision makes no reference to the policy of the New York legislature as expressed in § 799. Nor did the Court refer to the DeLago decision which relied upon the destructible nature of the evidence in upholding an unannounced entry by police officers who had a search warrant. In DeLago,

> "it was represented to the Court by affidavit that gambling materials were likely to be found at this location and in issuing the warrant the court could take judicial notice that contraband of that nature is easily secreted or destroyed if persons unlawfully in possession thereof are notified in advance that the premises are about to be searched." 16 N Y 2d at 292. (Emphasis supplied).

The Court made this finding notwithstanding the fact that:

> "there [was] nothing in the affidavit to show specifically how or where these gambling materials would be likely to be destroyed or removed, [because] the likelihood they would be was an inference of fact which the Judge signing the warrant might draw." 16 N Y 2d at 292.*

* People v. DeLago has been cited by the New York courts in non-warrant cases as establishing an exception to the announcement requirement where a no-knock entry is effected to prevent destruction of evidence. See People v. Ernest E., 38 A D 2d 394, 396 (2d Dept. 1972), affd. 30 N Y 2d 884 (1972); People v. McIlwain, 28 A D 2d 711 (2d Dept. 1967); People v. Gallman, 19 N Y 2d 389, 395, n. 1 (1967) (Fuld, C.J. dissenting).

See also People v. Mitchell, 31 N Y 2d 1036 (1973):

> "the character of the evidence [i.e., heroin and cocaine] certainly justified a 'no-knock' authorization to thwart probable destruction on even the shortest notice." 31 N Y 2d at 1039 (emphasis supplied) (Jones, J. dissenting).**

It is clear, therefore, that under New York law, the police officers in this case could have obtained a search warrant permitting a no-knock entry by stating that there was probable cause to believe that narcotics which could be disposed of easily had been brought into appellee's apartment. However, it was impracticable for them to do so as Assistant District Attorney Martin testified (S.H. 36) and as the District Court necessarily held in finding (a) that there was probable cause to arrest and search and (b) that the search was illegal solely because the police failed to announce themselves. Having upheld the right to search without a warrant, it was anomalous for the District Court to then invalidate the search by disregarding a fact which would have entitled the police to a no-knock authorization if they had had time to obtain a warrant.

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* In Mitchell the Court of Appeals upheld a warrant which authorized no-knock search at anytime during the day or night. Judge Jones dissented solely on the ground that there was no basis to issue a warrant permitting a search at anytime.

It is evident that in the instant case the District Court invalidated a New York State judgment of conviction without citing any legal authority which required such a result. In place of legal authority the court relied on its own interpretation of congressional policy with respect to no-knock entries -- a policy which is not binding on the states. At the same time, it completely failed to take into account New York statutes and cases which take a contrary view and which are consistent with the constitutional guidelines established in Ker v. California. Until such time as those constitutional guidelines are modified it was error for the District Court to impose a federal standard on the states in an area left open to the State by the Ker decision.

CONCLUSION

THE DECISION OF THE DISTRICT COURT SHOULD BE REVERSED.

Dated: New York, New York
November 24, 1975

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent-
Appellant

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

LILLIAN Z. COHEN
Assistant Attorney General
of Counsel

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